Supreme Court, U.S.
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No. 96-1399

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES OF AMERICA EX REL. DON H. HAYCOCK,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Hughes Aircraft Company takes issue with the convoluted and confusing statement of the questions presented in the petition. Instead, Hughes believes the questions at issue can be stated simply as follows:

1. Did both the District Court and Ninth Circuit (which reviewed the record de novo) err in concluding that Hughes did not submit any false claims to the government?

2. Did the courts below deny Petitioner due process by awarding Respondent attorneys' fees and expenses under 31 U.S.C. § 3730(d)(4), which provides for an award of attorneys' fees and expenses if a *qui tam* action is found to be "clearly frivolous"?

PARTIES TO THE PROCEEDING

As identified in the petition, the parties to the proceeding are pro se petitioner Don H. Haycock, Esquire (hereafter referred to as "Mr. Haycock") and respondent Hughes Aircraft Company ("Hughes").

For purposes of further clarification, Hughes notes that this action was brought under the so-called *"qui tam"* provisions of the civil False Claims Act (31 U.S.C. §§ 3729-3733 (1994)), which enable a private citizen (often referred to as a "relator") to bring a false claims action on behalf of the federal government, and under the Truth In Negotiations Act (10 U.S.C. § 2306 (1994)), which is a statute governing a contractor's disclosure of information to the government during contract price negotiations. The United States, which is identified in the case caption, has a right of intervention in all *qui tam* actions. In this action, Mr. Haycock prosecuted the action on his own after the United States declined to intervene. (R.8.) Pursuant to the government's request -- and as reflected on the proof of service -- the parties serve copies of all filed papers upon the government, even though the government is not a party to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Hughes notes that it is a wholly-owned subsidiary of HE Holdings, Inc., which is in turn a wholly-owned subsidiary of Hughes Electronics Corporation ("HEC"). HEC, in turn, is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock (New York Stock Exchange: GMH).

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INTRODUCTION

Hughes Aircraft Company respectfully requests that the Court deny the petition because Petitioner has failed to identify any compelling reason to grant *certiorari*.1/

1/ Hughes also notes that, as of the date of this Opposition, Mr. Haycock has failed to comply with this Court's Rule 12.3, requiring the petitioner to provide notice "promptly" to respondents of the date of filing, the date the case was placed on the docket, and the docket number of the case. S.Ct. Rule 12.3.

The petition identifies no conflicts between the Circuits (and there is none). The petition identifies no "important question of federal law" which should be decided by this Court or which was decided by the Ninth Circuit in contravention of any relevant decision of this Court. Moreover, Mr. Haycock provides neither facts nor authority to warrant this Court's exercise of its supervisory power to correct alleged injustices below.

Instead, Petitioner continues to prosecute this frivolous case as he did below. Unfettered by any sense of public duty and guided only by his personal animus toward Hughes, he misstates the facts, presents no authority to support his views, and improperly asks this Court to grant *certiorari* to reverse the decisions below on the grounds of alleged erroneous findings of fact and misapplication of the law. Moreover, notably missing from the petition is a copy of the District Court's Order Granting Summary Judgment, setting forth its findings of fact and conclusions of law, and several key portions of the District Court's order regarding the parties' motions for summary judgment (select excerpts of which are attached to Petitioner's Appendix 3). Thus, Petitioner omits from the record the most critical portions of the orders his petition questions.

OPINIONS BELOW

At issue in the petition is the unpublished opinion of the Court of Appeals, filed October 6, 1996 (and reprinted in the Petitioner's Appendix to the Petition ("Pet. App.") at App. 2-4), and the unpublished order of the Court of Appeals denying Petitioner's petition for rehearing and rejecting his suggestion for rehearing *en banc*, filed December 6, 1996 (and reprinted at Pet. App. at App. 1).

The District Court's unpublished opinion granting Hughes' motion for summary judgment and denying Mr. Haycock's motion for summary judgment on the merits (only part of which Petitioner appended to his petition) is reprinted in full in the Appendix to this Brief in Opposition to Petition for Writ of *Certiorari* ("Resp. App."), at 1a-4a. The District Court's unpublished Order Granting Summary Judgment, setting forth the court's findings of fact and conclusions of law, is reprinted in Resp. App., at 5a-24a.

The District Court's unpublished order granting Hughes' motion for award of attorneys' fees pursuant to 31 U.S.C. § 3730(d)(4) is reprinted at Pet. App. at App. 8-13. The District Court's unpublished order denying Mr. Haycock's motion for reconsideration of the attorneys' fees award is reprinted at Pet. App. at App. 14-15.

PERTINENT STATUTORY PROVISIONS

(Not already noted in the petition)

The Civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.* provides, in part:

> § 3730(b) Actions by private persons. -- (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
>
> (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
>
> (3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the

defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall --

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

STATEMENT OF THE CASE

Mr. Haycock brought this *qui tam* action under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA")[2/] and the Truth In Negotiations Act, 10 U.S.C. § 2306 ("TINA"). After an extensive 20-month investigation pursuant to 31 U.S.C. § 3730(b), the United States declined to intervene in the case. (R.8.) Once unsealed, Mr. Haycock's complaint of fraud proved fundamentally flawed. First, as the courts below found, based on the evidence provided by Hughes, Mr. Haycock misunderstood the way Hughes employees charged labor time to government contracts via an allocation pool. (Pet. App. at App. 5-7; 9; Resp. App., at 1a-4a, 8a, 14a-16a.) Then, because he erroneously believed that the relevant Hughes employees were classified as "indirect," Mr. Haycock compounded his error by asserting that those employees should have been charging their labor time to "indirect" or "overhead" accounts, rather than directly to

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2/ The history, background and legislative purpose behind the *qui tam* provisions of the False Claims Act are summarized in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991).

government contracts. (*See* Resp. App., at 8a.) Having made a mistake, frequently made by those not schooled in the technicalities of government contract cost accounting, Mr. Haycock alleged that Hughes' actions violated the cost accounting standard disclosure statement ("CAS Disclosure Statement") that Hughes had submitted to the government, as well as the federal cost accounting regulations. *Id.*

During discovery, Mr. Haycock conceded that he neither read Hughes' CAS Disclosure Statement before filing his complaint nor knew that it specifically provided for a direct allocation pool into which the relevant Hughes' employees could charge their time.[3/] (*See* Resp. App., at 14a-16a; Pet. App. at App. 9.) Discovery also disclosed that Mr. Haycock was ignorant of how the relevant Hughes' employees actually charged their time; he incorrectly believed that each employee listed hundreds of different contract numbers on a time card each week and then arbitrarily spread labor time over those contract numbers, regardless of whether they actually worked on the contracts associated with those numbers.

Mr. Haycock also was unaware that the government had reviewed Hughes' disclosure of its direct charge allocation system before it was instituted, as well as the mechanics of the system itself, and that the government had found the system and Hughes' disclosure to be compliant with federal government contract accounting regulations. *Id.* When Mr. Haycock learned of the direct allocation pool and of Hughes' government-approved disclosure statement, he

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3/ Specifically, Hughes' relevant CAS disclosure statements provided in pertinent part as follows:

> a direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals.

Hughes' CAS Disclosure Statement, Section 2.5.0. (Pet. App. at App. 43.)

wrote Hughes, stating that if Hughes could "prove" this revelation (to him) about the disclosure statements, he would fold his case. (Pet. App. at App. 9-10.) Hughes subsequently provided Mr. Haycock the relevant CAS Disclosure Statements for 1983 - 1987, the years Mr. Haycock claimed were at issue. Hughes also provided copies of other relevant documentation that Hughes had submitted to the government in that timeframe in conjunction with its accounting system disclosures, and declarations from the two responsible government officials charged with responsibility for auditing, reviewing and approving Hughes' accounting system for the relevant years. (Resp. App., at 3a-4a.) Those two government officials' declarations stated that they had reviewed and approved of Hughes' CAS disclosure statements and its direct allocation pool charging system for the employees in question. (*Id.*, 10a-14a.)

Notwithstanding the receipt of those declarations and his promise to fold, Mr. Haycock continued to prosecute the case. At the same time that Hughes filed a motion for summary judgment, Mr. Haycock filed his own summary judgment motion. (R. 58-62.) He filed no "expert" declaration in conjunction with either his own summary judgment motion or Hughes' summary judgment motion.[4/] Rather, as the trial court below found, he continued to rely solely on his own "misguided" interpretation of the government officials' declarations, the disclosure documentation submitted to the government by Hughes, and the federal regulations and Cost Accounting Standards. (Pet. App. at App. 5-6.)

4/ The "expert" declaration (of Peter Elliott) Mr. Haycock now relies on to support his claims in the petition was not in the record before the District Court at the time it considered the parties' cross-summary judgment motions. Rather, without seeking leave of court or putting forth any reason for his failure to submit that declaration with the parties' cross-motions for summary judgment, Mr. Haycock only belatedly filed his "expert's" declaration in conjunction with his motion for reconsideration of the attorneys' fees award (R. 139), after the District Court ruled on the summary judgment motions and after the ruling on Hughes' attorneys' fees motion.

Based solely on his fallacious views (and without any supporting evidence), Mr. Haycock argued in his summary judgment papers that Hughes' disclosure documentation and the government approval did not cover the majority of the Hughes' Systems Engineering Laboratory ("SEL") employees who were charging their time directly to government contracts. (R.58-62.) Rather, although he never specifically identified (either by name or by job category) which employees supposedly were not covered, he argued that the disclosure statement and government approval only extended narrowly to five categories of SEL employees. *Id.* Mr. Haycock claimed that Hughes' system of charging such SEL employees' time directly to contracts, therefore, violated Hughes' "promise to the Government" to follow its disclosed cost accounting standards practices (Resp. App., at 21a ¶ 23), and constituted the submission by Hughes to the government of false or fraudulent claims for payment in violation of the FCA, and of maintaining inaccurate historical cost records in violation of TINA. *Id.*[5/]

As found by the District Court, the evidence submitted by Hughes in support of its motion for summary judgment contradicted Mr. Haycock's claims. (Pet. App. at App. 6-7, 10-12. The court found that Hughes conclusively demonstrated that its practice of directly charging the labor time of the SEL employees addressed in Mr. Haycock's complaint was compliant with the Cost Accounting Standards. *Id.* The court also found that Hughes' evidence showed that its CAS Disclosure Statement properly disclosed its charging practice to the responsible government officials. *Id.* The court also found that Hughes demonstrated that

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5/ TINA requires that defense contractors engaged in negotiations with the government for certain defense contracts (defined in the statute) submit, at the conclusion of negotiations and prior to award of the contract, an executed certificate that states that all cost or pricing data submitted by the contractor to support negotiations was "current, accurate and complete." 10 U.S.C. § 2306(f). Mr. Haycock never explained how (or presented any evidence to show why) Hughes' cost charging practice for the SEL employees at issue supposedly constituted a violation of TINA. (Pet. App. 2 at App. 3; *see also* Resp. App., at 19a-21a.)

those government officials had approved that time charging practice. *Id.*

In addition to making these findings, the District Court also undertook a thorough independent review of the evidence submitted by Mr. Haycock, but was unable to find any credible evidence in the record supporting Mr. Haycock's allegations. (Pet. App. at App. 5-6.)

In granting Hughes' motion for summary judgment and denying Mr. Haycock's motion for summary judgment, the District Court expressly found that Mr. Haycock's claims were unsupported, and that the language set forth in Hughes' disclosure statements was not limited in the way Mr. Haycock suggested. (Pet. App. at App. 7.) In its March 4, 1994 order (Resp. App., at 1a-4a), the District Court stated, in pertinent part:

> The best that can be said of Plaintiff's papers is that they are misguided, the assertions made are unsupported by admissible evidence. . . . The Court is given little if any guidance as to where to look for support for Plaintiff's assertions; and, despite the fact that the Court has undertaken to discover admissible evidence which might support Plaintiff's arguments by independently reviewing the mass of documentation submitted, no such evidence can be found. At most, Plaintiff has put forth evidence that Defendant's employees charged their time on an allocation basis. The problem is that as Defendant convincingly explains in its motion for summary judgment, this allocation system was disclosed to, and investigated and approved by, the government.

Id., at 2a. The court also found that Mr. Haycock had offered no evidence to contradict or question the testimony of the government officials whose sworn declarations supported Hughes' position. *Id.*, at 3a-4a. The court concluded that, "The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system." *Id.*, at 4a. In its separate order setting forth its findings of fact, the court adopted verbatim (with the exception of a proposed conclusion regarding Rule 11

sanctions sought by Hughes) Hughes' proposed findings of fact and conclusions of law. (*See* Resp. App., at 2a, 5a-24a.)

Following the March 1994 summary judgment order, in April 1994, Hughes submitted a motion for an award of attorneys' fees and costs incurred by Hughes under section 3730(d)(4) of the FCA. That section provides for an award of attorneys' fees and expenses if a *qui tam* action is found to be "clearly frivolous." Giving Mr. Haycock the benefit of the doubt as to his underlying (and mistaken) assumptions in support of his claims for the period from the commencement of his suit until he received from Hughes the relevant CAS Disclosure Statements and declarations of the government officials responsible for approving Hughes' cost accounting practices, Hughes limited its attorneys' fees and cost request to the costs and fees it incurred after December 20, 1993 (the date when Mr. Haycock received from Hughes the government officials' declarations). (R. 117.) The District Court granted Hughes' attorneys' fees request, based on its determination that Mr. Haycock continued to prosecute his case long after all the allegations in his complaint had been addressed by Hughes and shown to be without merit. For the period after Hughes' service of the government officials' declarations, the court found that Mr. Haycock's continuation of the litigation was "clearly frivolous." (Pet. App. at App. 8-13.)

After the District Court denied his motion for reconsideration of the summary judgment order and attorneys' fees award (Pet. App. at App. 14-15), Mr. Haycock appealed to the Ninth Circuit. (R. 192.) On appeal, Mr. Haycock relied primarily on the declaration of his "expert," which had not been before the District Court during its consideration of the summary judgment motions (but which he submitted for the first time only in conjunction with his motion for reconsideration of the Court's attorneys' fees award). *See supra*, note 4. Mr. Haycock alleged that the District Court applied the incorrect rule of law to the relevant facts and incorrectly concluded that Hughes' time charging practice was fully disclosed and approved by the responsible government representatives. Notwithstanding, during oral argument before the Ninth Circuit, Mr. Haycock conceded that there was no evidence in the record (other than his "expert's declaration which was not in the record below) to

contradict the government officials' declarations. (*See* Petition, at p. 24.) The Ninth Circuit reviewed Mr. Haycock's "expert" declaration and determined that "the [trial] court was within its discretion in concluding the expert witness declaration filed by Haycock added nothing new on the question whether the relator should have stopped litigating after the disclosures which showed absence of fraud or false statement." (Pet. App. at App. 4.)

After reviewing the record de novo, and following oral argument, the Ninth Circuit rejected Mr. Haycock's allegations, concluding in an unpublished opinion that Mr. Haycock presented no evidence of fraud or false statement, nor was there evidence in the record to show that Hughes had provided false pricing information to the government or otherwise falsely certified its costs under TINA. (Pet. App. at App. 2-4.) Finally, the Ninth Circuit reviewed the award of attorneys' fees for abuse of discretion, and determined that the District Court was within its discretion to award attorneys' fees under the FCA. *Id.* Following issuance in October 1996 of the Ninth Circuit's unpublished decision, Mr. Haycock petitioned the Ninth Circuit for rehearing and for publication of its ultimate decision in the case. The Ninth Circuit denied Mr. Haycock's requests. (Pet. App. at App. 1.) Thereafter, even though he had failed to prevail at each stage of the proceedings, Mr. Haycock filed an application for an award of costs pursuant to the Ninth Circuit's rule providing for such an award to the prevailing party on appeal. The court did not rule on Mr. Haycock's cost application, but in December 1996 granted Hughes' earlier-filed cost application.

In contrast to Mr. Haycock's misstatements of the facts and law in his petition, the opinions of the District Court and the Ninth Circuit correctly set forth the facts of this case and the proceedings below. The FCA requires a false claim in the first instance, and the courts found no evidence of a false claim. (Pet. App. at App. 2-15; Resp. App., at 1a-4a, 18a ¶ 24.) The FCA also permits an award of attorneys' fees and costs to be made to the defendant, where the court finds that a *qui tam* action was "clearly frivolous." 31 U.S.C. § 3730(d)(4). Applying the law to the facts in this case, the courts below ruled correctly in determining that there were

no unauthorized labor charges that were charged directly to government contracts and, therefore, no FCA or TINA violation. Based on Mr. Haycock's receipt during discovery of conclusive evidence underlying the courts' rulings, it was properly within the courts' discretion to conclude that Mr. Haycock's continued prosecution of his action was "clearly frivolous," warranting an award of attorneys' fees and costs under the FCA.

Mr. Haycock's attempt to assign error to the lower courts is wholly inadequate to establish a compelling basis for this Court to grant *certiorari*. The lower courts' informed decisions declining to accept his baseless interpretations of government actions in reviewing and approving Hughes' labor charging system do not provide Mr. Haycock the compelling basis he needs to obtain this Court's review.

REASONS FOR DENYING THE PETITION

Pursuant to Rule 10 of this Court, review by this Court on a writ of *certiorari* is not a matter of right. S.Ct. Rule 10. Instead, "[c]ertiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *National Labor Relations Board v. Pittsburgh S. S. Co.*, 340 U.S. 498, 502 (1951), *citing Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923)*. *Certiorari* is granted only for compelling reasons, such as where there is a conflict between decisions of different Circuit Courts, or where a lower court has decided an important question of federal law that has not been, but should be, settled by the Court, or has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. S.Ct. Rule 10. Another ground is where conduct in the courts below has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court must intervene in exercise of its supervisory power. *Id.*

Here, none of those grounds exists. As discussed more thoroughly *infra*, the unpublished opinions of the trial court and Ninth Circuit in this matter have no precedential value, and the determinations and fact-intensive conclusions of

those courts pertain solely to Mr. Haycock and Hughes. The Ninth Circuit's decision creates no conflict among the Circuits. There also are no important federal questions at issue. Further, despite the claim of a Constitutional violation, there is no public interest at stake, nor any factual or legal support that any such violation occurred. Also, the well-founded and well-reasoned concurring conclusions of both courts below in no way evidence any departure from the accepted and usual course of proceedings so as to call for an exercise of this Court's supervisory power.

Instead, rather than set forth any compelling basis to grant *certiorari*, Mr. Haycock's petition is based solely upon his hostility toward Hughes. Unlike a public prosecutor who is bound by a code of professional conduct and by a sense of public duty, Mr. Haycock is the all too common private relator who freely offers erroneous allegations of fact and misapplications of law. Mr. Haycock has presented no substantial question for review. It is well-settled that such grounds do not suffice (except only rarely) to compel the Court to grant *certiorari*. S.Ct. Rule 10. As such, Hughes submits that the petition should be denied.

A. PETITIONER ASSERTS ONLY ERROR BASED UPON ERRONEOUS FACTUAL FINDINGS AND MISAPPLICATION OF LAW WHICH ARE NOT SUFFICIENT TO WARRANT SUPREME COURT REVIEW.

Mr. Haycock asserts error in the factual determinations and legal conclusions concurred in by the two lower courts. To support his claims, he presents his issues using inflammatory language, misstates the facts in the record, and cites to an alleged Constitutional violation of his due process rights in an attempt to mislead the Court into believing that something truly important is at stake here.

The purpose of granting *certiorari* is not for this Court to correct an error in a lower court's decision. This Court does not grant *certiorari* merely to review findings of fact concurred in by two lower courts, or to review evidence or inferences drawn from evidence. *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178 (1938); *United States v. Chemical Foundation*, 272 U.S. 1, 14 (1926). Decisions of lower courts which are

dependent upon the facts are not to be disturbed, unless plainly without support. *Id.*

Here, as demonstrated in the lower courts' decisions, there is ample evidence to support those decisions. Conversely, there is no credible evidence in the record to support Mr. Haycock's allegations, as determined by both courts below. As discussed above in the Statement of Facts, the District Court found that Mr. Haycock had provided it with "little if any guidance as to where to look for support for [Mr. Haycock's] assertions," so the court "independently reviewed the mass of documentation submitted," but could find no support for Mr. Haycock's claims. (Pet. App. at App. 5-6.) The Ninth Circuit, after reviewing the record *de novo*, opined: "we conclude that Haycock presented no evidence of fraud or false statement." (Pet. App. at App. 3.) Also, Mr. Haycock's dire prediction of the horrible consequences that will result by allowing the Ninth Circuit's decision to stand is mere hyperbole. (Petition, at pp. 28-29.) The Ninth Circuit determined that its decision on this matter was not appropriate for publication. (*See* Pet. App. at App. 2).[6/] Pursuant to the Ninth Circuit's Rules:

> Any disposition that is not an opinion or an order designated for publication. . . **shall not be regarded as precedent** and shall not be cited to or by this Court or any district court of the Ninth Circuit. . . .

USCS Court Rules, Court of Appeals, Ninth Circuit, Rule 36-3 (emphasis added). Therefore, the Ninth Circuit's decision in this case has no precedential value and, as such, can have no bearing (positive or negative) on the future behavior of Government contractors.

6/ The Ninth Circuit designated for publication only a separate opinion issued in this case, relating solely to the issue raised on appeal by Hughes (and not addressed or cited in the petition) of the timing of the filing of a notice of appeal in a *qui tam* case. In petitioning for rehearing to the Ninth Circuit, Mr. Haycock requested publication of the court's ultimate decision on the merits, but the court denied his requests (both for publication and for rehearing). (Pet. App. at App. 1.)

To grant *certiorari* in this case would entail a lengthy factual review by this Court of the evidence to determine whether the two lower courts' concurring determinations were clearly without support. Such is not the purpose of review by this Court. S.Ct. Rule 10; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). Therefore, the Court should deny the petition.

B. THERE IS NO CIRCUIT CONFLICT IN ISSUE.

Mr. Haycock argues that this Court should grant *certiorari* to correct the Ninth Circuit's misinterpretation and misapplication of federal regulations which, if allowed to stand, will provide:

> an invitation to present and potential Government contractors to engage in this unlawful labor-charging practice because the Ninth Circuit has approved it.

Petition, at p. 28. He cites Sixth Circuit and Second Circuit cases for the proposition that "knowingly charging unauthorized overhead labor to the United States government as labor directly on government contracts has been held a fraud under the False Claims Act." *Id.*, at p. 9. However, he does not claim that the Ninth Circuit's decision in this case contradicts those circuits' holdings, nor does it. To the contrary, the Ninth Circuit did not say that there was no fraud when one knowingly charges unauthorized overhead labor as direct labor. Rather, the Ninth Circuit merely said that there was no evidence of any unauthorized overhead labor being charged directly to a government contract. (Pet. App. at App. 2-4.) Thus, in accordance with the law as enunciated by the Sixth and Second Circuits, and not contrary to it, the Ninth Circuit correctly concluded that the record established no fraud.

Review by this Court, therefore, is not warranted because there is no split in decisions between the Circuits. S.Ct. Rule 10; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

C. THERE ARE NO IMPORTANT QUESTIONS OF FEDERAL LAW AT ISSUE.

In addition, there is no important federal question at issue here; nor did the lower courts act outside the normal and acceptable bounds of justice in this case. As discussed above, this is not a case in which the Ninth Circuit misconstrued federal government contract regulations and concluded, as a matter of law, that a contractor may lawfully charge unauthorized indirect labor charges directly to a contract. Nor did the Ninth Circuit misconstrue or misapply the FCA or TINA to the facts in the record before it. Instead, the Ninth Circuit properly looked to the record for any evidence of unauthorized charging of indirect labor as direct labor and found no such evidence. (Pet. App. at App. 2-4.) Determining that the record was void of evidence that Hughes' labor charges were unauthorized or lacked the required approval by the government and, therefore, were not in compliance with the federal contract regulations, the Ninth Circuit concluded that neither Mr. Haycock nor the record established an FCA or TINA violation. *Id.* Mr. Haycock's disagreement with the government officials responsible for overseeing Hughes' cost charging practices and determining when to prosecute legitimate cases of fraud and with the lower court's findings of fact establishes no important federal question. S.Ct. Rule 10; *General Talking Pictures Corporation v. Western Electric Company, Inc.*, 304 U.S. 175, 178 (1938).

D. THE ALLEGED CONSTITUTIONAL VIOLATION CLAIM IS BASED ON MR. HAYCOCK'S DISPLEASURE WITH THE LOWER COURTS' FINDINGS AGAINST HIM; IT DOES NOT IMPACT THE PUBLIC INTEREST.

Mr. Haycock's Constitutional claim also is insufficient to warrant Supreme Court review. He claims that the trial court denied his request for a hearing and awarded Hughes attorneys' fees and costs based "on a mistaken understanding of what the evidence proved." (Petition, at pp. 29-30). In so arguing, he completely ignores the fact that the Ninth Circuit also conducted its own review of the issue and came to the same conclusion as the trial court. (*See* Pet. App. at App. 4.) Moreover, Mr. Haycock's due process complaint pertains

exclusively to him. There is no public interest at stake in the courts' conclusion that Mr. Haycock's continuing to prosecute the case was "clearly frivolous," after Hughes gave him uncontroverted evidence that Hughes' labor charging practices were disclosed to, investigated by and approved by the government. Nor is there any public interest at stake in the courts' determination that Mr. Haycock failed to rebut with credible evidence Hughes' evidence of approval and authorization.

This Court has long denied review where the resolution of the principles involved in the case are important only to the parties, rather than to the public. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Here, the only person affected by the trial court's award of attorneys' fees (which the Ninth Circuit affirmed after hearing oral argument on the subject) is Mr. Haycock himself. The FCA expressly provides for an award of attorneys' fees when an appropriate finding is made in a *qui tam* relator's lawsuit. 31 U.S.C. § 3730(d)(4); *and see United States ex rel. Minna Ree Winer Children's Class Trust v. Regions Bank*, 1996 U.S. Dist. LEXIS 8779, *1-2 (E.D. La. 1996) (relator's "fact-starved" allegations and worrisome litigious history amply support court's finding that defendants had demonstrated that relator's suit is clearly frivolous and that defendants are entitled to reasonable attorneys' fees and expenses in defending such claims under 31 U.S.C. § 3730(d)(4)); *United States ex rel. Herbert v. Nat'l Acad. of Sciences*, 1992 U.S. Dist. LEXIS 14063,*1 (D.D.C. 1992) ("because both the jurisdictional and substantive bases of Plaintiff's *qui tam* action so clearly failed to state a valid federal claim, this Court will grant the Defendant's motion for reasonable attorneys fees and expenses under 31 U.S.C. § 3730(d)(4) and Rule 11").

The public is not harmed by the courts' attorneys' fees award in accordance with that law; to the contrary, public interest is well-served by the fact that the courts did precisely what Congress intended they should do in such a case. Therefore, *certiorari* should not be granted on this basis.

CONCLUSION

For the foregoing reasons, Hughes urges the Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

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April 4, 1997

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

United States of America *ex rel.* Don H. Haycock, Plaintiff, v. Hughes Aircraft Company, Defendant.	CV 90-1977 KN ORDER Re: Motion to Dismiss and Motions for Summary Judgment (Filed Mar. 4, 1994)

Based on the papers submitted, the Court rules as follows:

1. The court does not decide Defendant's motion to dismiss portions of the Second Amended Complaint ("SAC") based on the statute of limitations because Plaintiff's underlying claims lack merit and therefore, as discussed below, granting Defendant's motion for summary judgment disposes of this case.[1/]

1/ Were the Court to decide this motion, the principal issue would be whether the SAC relates back to the original complaint under Fed.R.Civ.P. 15(c). The standard in the Ninth Circuit is: did "the original pleading put the defendant on notice of the 'particular transaction or set of facts' that the plaintiff believes to have caused the complained of injury." *Percy v. San Francisco General Hosp.*, 841 F.2d 975, 979 (9th Cir. 1988). Because Plaintiff's original and first amended complaint were both dismissed for failure to plead with the requisite particularity under Fed.R.Civ.P. 9(b), Defendant would have a strong argument that these pleadings also did not give sufficient notice for purposes of Rule 15(c).

(Footnote cont'd on next page)

2. Plaintiff's motion for summary judgment is **DENIED**. The best that can be said of Plaintiff's papers is that they are misguided, the assertions made are unsupported by admissible evidence, and in form they fail to comply with the Federal and Local Civil Rules. The Court is given little if any guidance as to where to look for support for Plaintiff's assertions; and, despite the fact that the Court has undertaken to discover admissible evidence which might support Plaintiff's arguments by independently reviewing the mass of documentation submitted, no such evidence can be found. At most, Plaintiff has put forth evidence that Defendant's employees charged their time on an allocation basis. The problem is that as Defendant convincingly explains in its motion for summary judgment, this allocation system was disclosed to, and investigated and approved by, the government.

3. Defendant's motion for summary judgment is **GRANTED**. In addition to adopting the vast majority of Defendant's Statement of Uncontroverted Facts and Conclusions of Law, and signing Defendant's proposed Order granting summary judgment (with one paragraph excepted), the Court adds the following observations:

A. Although Plaintiff/Relator is representing himself, he is an attorney and a member of the bar. It is therefore difficult for the Court to understand how Mr. Haycock could fail to comply with the simplest of Local Rules -- *e.g.*, Plaintiff failed to file both points and authorities entitled "Opposition to Defendant's Motion for Summary Judgment" and a "Statement of Genuine Issues of Material Fact." *See* Local Rules 7.6 and 7.14.2. Instead, Plaintiff filed (1) a document entitled "Supplemental Points and Authorities in Support of Plaintiff's Motion for Summery

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(Footnote cont'd from previous page.)

As to the retroactivity argument, the Court has taken the position in other cases that to the extent the 1986 Amendments to the False Claims Act affected substantive rights -- as the extension of the statute of limitations surely did -- they may not be applied retroactively. *Hyatt v. Northrop*, CV 86-6437 KN, Order of October 1, 1993 at pp. 7-11.

Judgment," which is later (on the bottom of the cover page) characterized as being "in response to defendant's motion for summary judgment," and (2) a document entitled "Plaintiff's Response to Defendant's statement of uncontroverted facts and conclusions of law in support for summary judgment," which is utterly devoid of the specificity needed for the Court to determine if there is evidence to support Plaintiff's assertions of genuine issues of fact. *See* Local Rule 7.14.3. In addition, Plaintiff filed a "Supplemental Statement of Uncontroverted Facts," a document not authorized by the Local Rules and which Plaintiff did not seek leave of Court to file.

B. The crux of Plaintiff's dispute with Defendant's theory of the case appears to be that any disclosure by Hughes and/or approval by the government of using the allocation system of charging certain labor costs was limited to a small number of specific categories of technical managers and therefore did not include any other supervisory or manager-level employees or their secretaries. Such a reading of the record may be understandable if one looks only at certain documents (and for this reason the Court does not find it appropriate to impose sanctions against Plaintiff).[2/] Nevertheless, other than Plaintiff's unsupported assertions to the contrary, the undisputed facts in the record show that, according to the government officials then responsible for ensuring that Hughes was (1) properly charging its labor costs and (2) adequately disclosing its charging policies, there was full disclosure, discussion, consideration, and approval of the use of direct allocation pools for charging the time of managers, supervisors, secretaries, and other support personnel. Slater Decl. ¶¶ 6, 7,

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2/ For example, in a letter of August 24, 1983, Hughes' controller wrote to the government mentioning the reclassification of "assistant, associate and laboratory and department managers." Brunmier Decl. I at 65. Mr. Slater's Report of April 25, 1984, and Mr. Brunmier's memo of May 10, 1984, also both referred only to reclassification of specific categories of managers. *Id.* at 184, 188. And, no explicit mention of secretarial time was made until the December, 1986 Disclosure Statement. *Id.* at 173.

8, 10, & 11; Brunmier Decl., ¶ 13(c), (d); Defendant's Reply of January 19, 1994 at pp. 24-29. Plaintiff has offered no evidence to contradict or question the testimony of these declarants (nor, apparently, has Plaintiff deposed them). And, the most important document language -- that which is set forth in Hughes' Disclosure Statements -- is clearly not limited in the way Plaintiff suggests. *E.g.*, Brunmier Decl. at p. 71. The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system.

IT IS SO ORDERED.

Dated: March 4, 1994

/s/ DAVID V. KENYON
DAVID V. KENYON
UNITED STATES
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) ORDER GRANTING SUMMARY JUDGMENT ~~[PROPOSED]~~ - (KN) (Entered March 8, 1994)

This action having come before the Court on Defendant HUGHES AIRCRAFT COMPANY'S Motion For Summary Judgment, the evidence presented having been fully considered, the Court finds as follows:

STATEMENT OF UNCONTROVERTED FACTS

1. This action, filed in April 1990 by California-licensed attorney, Don H. Haycock, Esq. ("relator"), as *qui tam* relator pursuant to the False Claims Act ("FCA"), accuses Hughes Aircraft Company ("Hughes") of mischarging the labor time of managers and secretaries of the Systems Engineering Laboratory ("SEL") of Hughes' Electro-Optical and Data Systems Group ("EDSG"). Specifically, relator alleges that, between 1983 and 1987, managers and secretaries of the SEL improperly charged their time directly to contracts, instead of to "overhead" or "indirect" accounts, in violation of what relator alleges was Hughes' "promise to the government" set forth in Hughes' Cost Accounting Standards Disclosure Statement, the statement of its cost accounting practices required by federal regulation to be submitted to the government by federal defense contractors.

A. THE PARTIES

1. Defendant Hughes is a major supplier of military hardware to the United States government. The Hughes organization at issue in this case, the SEL, was a unit of the Division 71 of the EDSG, located in El Segundo, California. Division 71 was referred to at various times relevant to this action as the "Tactical Programs Division" and "Tactical Systems Division."

2. Throughout the period alleged in the Complaint, the SEL provided engineering support on an as-needed basis to a variety of governmental and commercial programs (including direct sales to foreign governments) performed by EDSG.

3. The SEL was comprised of several hundred engineers with a variety of areas of expertise. It was supervised by several levels of managers, who were responsible for evaluating the engineering needs of the supported programs, assigning SEL engineers with

appropriate skills to such programs, supervising the performance of these engineers, and evaluating the suitability of the engineering effort performed in light of the contractual requirements. (Deposition of Kai Thomassen ("Thomassen Depo."), pp. 11:25-13:3 (Exh. J to Myers Decl.; Deposition of Nate Simmons ("Simmons Depo."), pp. 12-14, 31-35 (Exh. K to Myers Decl.); Deposition of Jeffrey B. McConnell ("McConnell Depo."), pp. 41-42 (Exh. L to Myers Decl.).)

4. During the relevant time period, the SEL was part of a "matrix" organization, in which supervisory responsibilities were shared by managers in charge of the tasks that support contracts (program managers) and managers responsible for the resources (including the human resources and, as such, raises, promotions, etc.) that support contracts. (McConnell Depo., pp. 39:20-43:1 (Exh. L to Myers Decl.); Thomassen Depo., pp. 13:16-14:23 (Exh. J to Myers Decl.).)

5. Relator, Don H. Haycock, Esq., was an employee of Hughes Aircraft Company from 1961 to December, 1987. He joined the SEL in April 1984, where he worked in an engineering capacity until his retirement from Hughes in December, 1987. (Deposition of Don Haycock ("Haycock Depo."), Vol. I, pp. 12-42 (Exh. M to Myers Decl.).)

B. FILING OF THE INSTANT COMPLAINT

6. In April, 1990, relator filed this *qui tam* action under seal on behalf of the United States pursuant to the civil False Claims Act ("FCA"), 31 U.S.C. § 3729-3733.

7. After a lengthy investigation of relator's allegations and his evidentiary support submitted to the U.S. Department of Justice pursuant to 31 U.S.C. § 3730(b)(2)-(3), the government notified the Court in December, 1991, that it declined to intervene in this action.

8. On April 13, 1992, Hughes moved for an order dismissing relator's complaint for failure to plead fraud with particularity, which was granted by this Court on June 20, 1992.

9. On July 9, 1992, relator filed and served a First Amended Complaint, which was also dismissed by this Court for insufficient particularity.

10. On October 27, 1992, relator filed a Second Amended Complaint ("Complaint"), which is now the governing complaint in this action. Hughes answered the Complaint in November, 1992.

C. ALLEGATIONS OF THE COMPLAINT

11. The fundamental proposition of relator's Complaint is that SEL managers and secretaries, who performed what relator calls "indirect" or "overhead" functions, and who relator believes should have been directed to charge their time to "indirect accounts," were instead directed to charge their time to "direct labor" accounts, in violation of Hughes' promise to the government. (Complaint, ¶¶ 5-7.)

12. Relator's First Count alleges that this time-charging practice resulted in the submission of inflated claims for payment to the United States with respect to both "direct" and "indirect" costs, in violation of the FCA. (Complaint, ¶ 19.)

13. Relator's Third Count, which follows from his first, alleges that Hughes failed to maintain "accurate, current, and complete historical records" of actual direct labor costs, purportedly in violation of the Truth In Negotiations Act, 10 U.S.C. § 2306. (Complaint, ¶¶ 12, 27.)

14. A second Count, which was alleged in relator's original complaint, was dropped from the Second Amended Complaint.

D. HUGHES' UNDISPUTED EVIDENCE DEMONSTRATES THAT THE TIMECHARGING SYSTEM AT ISSUE WAS DISCLOSED TO AND APPROVED BY THE GOVERNMENT

15. Most of the SEL secretaries and managers named in relator's complaint charged their time directly to contracts through a "direct allocation system," which proportionately allocated their time, by way of a computer algorithm, to the totality of accounts charged by the employees who were supervised by the managers and for whom the secretaries

performed their efforts. This "direct allocation system" was implemented at Hughes only when it was fully disclosed to and approved by the government, and is consistent with similar systems used throughout Hughes and the defense industry in general.

16. Throughout the years immediately preceding the time period identified in the Complaint, most of the EDSG managers who were responsible for supervising employees who worked on a variety of contracts, (and who ultimately ended up on the allocation system,) were classified "indirect" and charged the preponderance of their time to indirect accounts. (Declaration of Robert Meyers ("R. Meyers Decl."), ¶ 4.) The primary tasks performed by these managers included trouble-shooting, insuring adequate staffing for each supervised contract, and assisting subordinates to resolve technical problems; managers also performed ancillary administrative and personnel duties. *Id.*

17. The time charged by those managers to indirect accounts was accumulated in what were referred to as "indirect cost pools" and then allocated across all the contracts on which EDSG worked; as a result, this time was allocated to a broader group of contracts than those which were most immediately supported by these managers. This led to an imprecise allocation of burden on unsupported contracts. *Id.* ¶ 5.

18. In the late 1970s, EDSG management began searching for a more equitable way to distribute the labor hours of lab managers responsible for supervising employees over the actual contracts benefited, such that those labor hours were fairly spread across only the supervised contracts. *Id.* ¶ 6.

19. In connection with this search, EDSG management considered requiring managers to charge their time directly to the particular contracts they supported through their supervisory efforts each given day, according to the number of hours spent working directly on those contracts. Because, however, these managers were supervising the labor efforts of as many as several hundred employees, who were working as many as several hundred contracts, a system of direct charging would have required managers to record on a daily basis each of the many account numbers associated with their

efforts, as well as whether their efforts were "direct" or indirect". Such a system would have required significant daily data-gathering and manual allocation of time to the appropriate charge numbers, and could easily have been manipulated (*i.e.*, by charging time away from overrun accounts). (R. Meyers Decl., ¶ 8.)

20. Because of the problems inherent in this proposed system, EDSG management turned to a concept of "direct labor pools" set up several years earlier at other Hughes' organizations. Pursuant to these direct pool systems, the time of lab managers and their secretaries whose labor benefited a definable group of contracts was charged to a single account number and then "allocated," by way of a computer algorithm, across the contracts on which their subordinates worked. In that way, the labor hours of supervisory employees were allocated only to those contracts benefited by the administrative/supervisory efforts of these employees, rather than to all contracts on which EDSG worked. (R. Meyers Decl., ¶¶ 8-9.)

21. Pursuant to federal regulations governing federal procurement activities, which require contractors to disclose to the government their accounting practices on a standard form called a "CAS Disclosure Statement," see CAS 351.60, EDSG included a description of this allocation system in a CAS Disclosure Statement submitted to the government for the Manufacturing Division, effective January 3, 1982, and for the Engineering Division (of which the SEL was a part), effective October 31, 1983.) (Declaration of Allan Brunmier ("Brunmier Decl."), ¶ 6, and Exhibits "A" and "B" thereto.)

22. These CAS Disclosure Statements disclosed to the government that supervisory labor that "benefited" specific contracts, but that could not practically be charged individually to such contracts, would be charged to "direct labor pools," and then distributed across the base of contracts charged by supervised individuals. The relevant language of these Disclosure Statements is as follows:

> 2.5.0 Method of Charging Direct Labor
> Various direct labor pools are maintained to collect labor charges that are impractical to individually charge to specific contracts but which clearly benefit same. The pools collect actual labor cost

> incurred. The pooled labor is applied to contracts based upon an appropriate base for the pool, *e.g.*, supervision labor is distributed based upon the labor distribution of supervised individuals. All pools are cleared annually.

(EDSG Disclosure Statement, attached as Exhibit "A" to Brunmier Declaration, at p. 71 (emphasis added).)

23. These CAS Disclosure Statements additionally described EDSG's criteria for determining whether costs would be charged directly or indirectly as follows:

> **3.1.0 Criteria For Determining How Costs Are Charged To Government Contracts Or Similar Cost Objectives.** The determination of whether a cost is charged directly or indirectly is dependent upon the purpose for which the cost is expended, i.e.:
>
> (1) If it identifiable to specific contractual performance, it is charged directly to the contract which created the requirement.
>
> (2) Costs incurred which are directly associated with contractual performance and impractical to charge directly to specific final cost objectives **[*i.e.*, a contract]**, are charged to intermediate cost objectives (such as a pool) for subsequent reallocation as direct charges to the specific final cost objectives.
>
> (3) If it is not identifiable to specific contractual performance and/or is necessary for maintaining and operating the general plant, the cost is charged indirectly.

(EDSG Disclosure Statement (October 1, 1984), attached as Exh. "C" to Brunmier Decl. at pp. 113-114.)

24. Taken together, the foregoing statements in EDSG's CAS Disclosure Statements put the government on notice that labs throughout EDSG, including the SEL, would charge supervisory labor into pools and then allocate these charges directly to contracts. (Brunmier Decl., ¶ 6; Slater Decl., ¶¶ 6-8; Murphy Decl. ¶ 15.)

25. Following submission to the government of the January, 1983 and October, 1983 EDSG CAS Disclosure Statement revisions, the Defense Contract Audit Agency ("DCAA"), the governmental entity charged with auditing contractor bid proposals, Disclosure Statements, and Requests for Payment, and the Air Force Plant Representative's Office ("AFPRO"), the agency responsible for overseeing contract administration at Hughes, each undertook a thorough review of the EDSG disclosures. (Slater Decl., ¶ 6; Brunmier Decl., ¶ 11.)

26. By statute, the DCAA and AFPRO were required to review and audit the CAS Disclosure Statements to determine (1) whether the Statement adequately described the contractor's cost accounting practices, and (2) whether the practices described were in compliance with the Cost Accounting Standards. (CAS 351.90; *see also* Hendricks Depo., pp. 58:20-59:18; Brunmier Decl., ¶ 11; Slater Decl., ¶ 5.) If the CAS Disclosure Statement was found to be adequate and compliant, as described, the contractor was advised by the ACO that the CAS Disclosure Statement has been accepted. *Id.*

27. In their reviews for adequacy and compliance, Dudley Slater, the DCAA Resident Auditor at Hughes, and Allan Brunmier, the Principal Administrative Contracting Officer at Hughes, focused particularly on the proposed "direct allocation system," which constituted a substantive change to the prior EDSG CAS Disclosure Statements. (Brunmier Decl., ¶ 6; Slater Decl., ¶¶ 6-8.)

28. In connection with his review, Mr. Slater met on more than one occasion with Al Kennedy, then the EDSG Assistant Group Controller, to discuss the implementation of the allocation system and the expected cost impact on existing contracts. (Slater Decl., ¶¶ 6-10).

29. The DCAA resident auditor specifically recalls considering, in connection with his audit of the CAS Disclosure Statement at issue, whether tasks commonly considered "indirect," such as completing performance evaluations or vacation schedules, could properly be charged "direct" through the proposed allocation system. Following discussions with the EDSG Assistant Group Controller, he concluded that including these charges would have a *de*

minimus effect on negotiated rates, and would improve administrative feasibility; he thus approved the use of direct pools for all charges. (Slater Decl., ¶ 7.)

30. As a result of his conversations with the Group Controller, his review of a "cost impact study" submitted by EDSG, and an independent review of the expected cost impact of the proposed change, Mr. Slater, the DCAA resident auditor, made a formal recommendation to Mr. Brunmier, the Principal Administrative Contracting Officer, that eligible employees be reclassified from "indirect" to "direct," and that the proposed allocation system be approved. (*See* "Report on Adequacy and Compliance Review of Disclosure Statement Revision," attached as Exhibit "F" to Brunmier Decl., pp. 184-185, *and* Slater Decl., ¶¶ 11-12.)

31. Based on this recommendation and on his own review of the Disclosure Statement, Mr. Brunmier determined as follows (Brunmier Decl., ¶ 12):

(a) that the direct allocation pool practice that had been disclosed was consistent with CAS 418, which provides for the designation of so-called "blanket costs," defined as costs that are accumulated in intermediate "cost pools" and then reallocated to contracts as direct costs;

(b) that the direct allocation pool practice that had been disclosed was consistent with the AFPRO's preference that costs be charged directly to contracts, rather than indirectly, whenever administratively feasible;

(c) that the direct allocation pool practice that had been disclosed would increase the accuracy of time-charging by supervisors, lab managers and their secretaries, because it would fairly allocate the labor costs of these employees across the totality of the contracts benefited, in direct proportion to the charges to each contract made by the supervised employees;

(d) that the direct allocation pool practice that had been disclosed would improve the consistency of time-charging, because it would eliminate

the arbitrary exercise of judgment of individual managers and secretaries as to whether particular tasks were properly charged as "direct" or "indirect" costs; and

(e) that the direct allocation pool practice that had been disclosed would not have any adverse cost impact on the government.

32. On May 1, 1984, Mr. Brunmier formally accepted the EDSG Engineering Division CAS Disclosure Statement, and all of its proposed changes, in a letter stating as follows:

> I have determined that these disclosure statements are adequate and in compliance with Cost Accounting Standards. . . . . It is my opinion the disclosed accounting changes do not result in any net increased cost to Government CAS covered contracts; therefore, no contract adjustments are required.

(May 1, 1984 letter from Allen Brunmier to Hughes Aircraft Company, attached as Exhibit "G" to Brunmier Decl.)

33. Thereafter, for each of the years alleged in the Complaint, CAS Disclosure Statements containing language identical to that quoted above were submitted to and approved by the government. (Brunmier Decl., ¶ 14, and October 1, 1984, December 30, 1985, December 29, 1986 revisions to EDSG CAS Disclosure Statement, attached as Exhibits C, D and E to Brunmier Decl. at pp. 110, 113, 159-160, and 172-173.)

34. The December 29, 1986 revision to the "direct labor pool" clause explicitly included "secretaries reporting to individuals who are direct" as among those to whom such clause applied. (*See* Exhibit E to Brunmier Decl., p. 173.)

E. RELATOR HAS INTRODUCED NO EVIDENCE TO CONTROVERT THE EVIDENCE INTRODUCED BY HUGHES

35. Relator has presented no evidence that SEL managers or secretaries charged in a manner inconsistent with what was disclosed to and approved by the government.

36. Relator's Complaint is premised on his allegation that Hughes' practice of charging the labor of SEL secretaries and managers directly to contracts violated Hughes' promise to the government set forth in its CAS Disclosure Statement. At his deposition, however, Haycock admitted that he had not even seen Hughes' CAS Disclosure Statements:

> Q: Mr. Haycock, you testified before that you had never seen Hughes' Disclosure Statement. . . . Is it still true that you've seen no Hughes' Disclosure Statements?
>
> A: That's true.

(Haycock Depo., Vol. II, p. 218:11-17 (Exh. W to Myers Decl.); *see also* Haycock Depo., Vol. I, p. 143 (Exh. X to Myers Decl.).)

37. Relator further testified that he was unaware of the nature of Hughes' "promise to the government" he alleges Hughes violated:

> Q: Now, with respect to the Disclosure Statement that you refer to in paragraph 5 of your complaint, would you state what you believe the promise that Hughes made to the government was that it violated as alleged in Paragraph 5?
>
> * * * *
>
> A: I don't know what they said but I'm referring to the practices for time-charging that Hughes would have represented to the U.S. Government in their Disclosure Statement that they were following.

(Haycock Depo., Vol. II, pp. 219-221 (Exh. Y to Myers Decl.).)

38. Relator testified moreover that he was ignorant of <u>any</u> disclosure to the government regarding any direct allocation system.

> Q: Are you aware of allocation systems of any kind with respect to any Hughes division or group that Hughes disclosed to the government?
>
> A: No.

(Haycock Depo., Vol. II, p. 269: 5-8 (Exh. Z to Myers Decl.).)

39. When pressed as to what he believed Hughes had represented to the government with respect to which employees were to charge their labor "direct" and which were to charge "indirect," relator testified that he did not know, and that, in any event, such a determination would be made by someone other than himself. (Haycock Depo., Vol. II, pp. 227-229 (Exh. AA to Myers Decl.).)

40. In addition, relator testified that he did not recall ever having seen any of the documents prepared by Hughes' finance personnel that indicated whether SEL employees should charge direct or indirect, and that the sole document on which his case was premised was a Hughes employee manual which provided a simplified overview of Hughes' timekeeping and accounting practices, was never disclosed to the government, did not purport to discuss the totality of Hughes' cost accounting practices, and was in no sense a "promise to the government" of any kind. (*Id.*; *and see* Simmons Depo., pp. 51-52 (Exh. BB to Myers Decl.); Declaration of Paul Hendricks ("Hendricks Decl."), ¶ 12.)

CONCLUSIONS OF LAW

1. The FCA creates liability to the United States for (1) the knowing presentation of a false or fraudulent claim for payment to the United States; (2) the use of a false record or statement to get a false or fraudulent claim paid or approved by the government; or (3) conspiring to defraud the government by getting a false or fraudulent claim allowed or paid. 31 U.S.C. § 3729(a).

2. The False Claims Act, 31 U.S.C. § 3729-3733, includes a "*qui tam*" provision which permits individuals with knowledge of the submission of a false or fraudulent claim for payment to the government to bring an action in the name of the United States and to receive a portion of the damages recovered thereunder. 31 U.S.C. § 3730. Such individuals are known as *qui tam* "relators." Black's Law Dictionary 1289 (6th ed. 1990).

3. Whether a claim for payment of labor costs is "false" cannot be determined by reference to the FCA, which

does not define what constitutes an allowable cost under government contracts, 31 U.S.C. § 3729; rather, such determination must be made by reference to independent statutes and regulations, such as the Cost Accounting Standards, which set the standards for entering and performing contracts with the federal government, and for accounting for costs under such contracts.

4. Hughes' cost accounting methods at issue cannot be "false" within the meaning of the FCA unless Hughes' actual cost accounting practices were secretly inconsistent with those disclosed to and approved by the government pursuant to the Cost Accounting Standards.

a) Cost Accounting Standards

5. The regulations governing federal procurement activities, which are set out in the Federal Acquisitions Regulations ("FAR") and the Cost Accounting Standards ("CAS"), require that contractors performing substantial work for the government devise and disclose to the government a body of "cost accounting practices" which will be used by the contractor in describing and accounting for the costs associated with performing government contracts. A "cost accounting practice" is defined by the regulations to be "any disclosed or established accounting method or technique which is used for measurement of costs, assignment of costs to cost accounting periods, or allocation of cost to cost objectives." CAS 331.20(k).

6. Disclosure of accounting practices is not required to be made for each contract executed between the contractor and the government, but rather is to be made on behalf of the contracting unit, for consistent application to all contracts performed by a given contracting unit. (CAS 351.40(b).) The contractor is required to have the CAS Disclosure Statement on file no later than the date on which the contractor submits a bid proposal to the government in an amount (not relevant here) above a designated threshold, and must act consistently with such CAS Disclosure Statement in every and any subsequently executed contract. (CAS 351.40(a).)

7. The intent of the Cost Accounting Standards is not to prescribe a particular method of cost accounting; rather,

the Standards' purpose is to insure that each contractor's cost accounting practices are disclosed and are consistently followed. (CAS 401.20.)

8. Consistent with this general purpose, the Cost Accounting Standards do not require any particular method of cost accounting, but rather require the contractor to disclose to the government its cost accounting practices with respect to the costs it incurs in the performance of its business (*i.e.*, labor, materials, depreciation, etc.), in order that the government may evaluate the consistency with which the contractor accounts for costs during all stages of contract proposal and performance. (CAS 331.60, 401.20, 401.40.)

9. Among the cost accounting practices that a government contractor must disclose to the government in its CAS Disclosure Statement is the criteria employed by the contractor for charging costs as "direct" or "indirect." *Id.*

10. The distinction between "direct" and "indirect" costs is premised on the recognition that while many costs ("direct costs") are incurred by a contractor for and benefit a contract, many other kinds of costs (*i.e.*, utilities costs associated with maintaining the plant, the salaries of high-level corporate employees who manage the business as a whole, etc.) are incurred for the benefit of the entire business organization, and thus cannot practicably be attributed to a particular contract or restricted group of contracts. Because of the impracticability of identifying these "indirect" costs to particular contracts, the Cost Accounting Standards permit contractors to separately account for "direct" and "indirect" costs.

11. As detailed in CAS 418, actual "direct costs" are charged directly to the contracts benefited by such costs. CAS 418.50(a)(2). In contrast, indirect costs are charged into "indirect cost pools," which include all indirect costs identified with the activity to which the pool relates, and then allocated on a *pro rata* basis across all of the contracts benefited by such efforts. An example would be an engineering overhead pool which would include the fringe benefits of the persons who worked in engineering, the rent or depreciation for their office space and equipment, the heat, telephone expense, etc. The costs collected in indirect cost

pools may be allocated across benefiting contracts in a variety of ways, as set forth more fully in CAS 418.50(b).

12. In addition to the two methods of cost allocation recognized above, the CAS recognizes a third method, termed "blanket costs," which provides for collection of "direct" costs in "intermediate cost pools" and the reallocation of such costs as "direct" costs. In this regard, the regulations provide:

> If a material amount of the costs included in the cost pool are costs of management or supervision of activities involving direct labor or direct material costs, resource consumption cannot be specifically identified with cost objectives. In that circumstance, a base shall be used which is representative of the activity being managed or supervised.

(CAS 418.40(c) and Preamble A thereto.) This highly technical language, in simple terms, means that where it is difficult to associate the cost of effort (*i.e.*, to measure "resource consumption") with the contracts that benefit from that effort ("cost objectives"), it is proper to accumulate those costs and spread them over the cost of the effort being managed (the "base").

13. Other than the general criteria described above, the Cost Accounting Standards do not instruct the contractor which costs are properly classified "direct" or "indirect"; rather, they require each contractor to develop and disclose to the government a set of standards by which the contractor will distinguish between direct and indirect costs -- *i.e.*, which costs the contractor can identify with particular contracts, and which they cannot -- and then to apply these standards consistently throughout the contracting process. (CAS 418.20.)

14. The primary focus of the Cost Accounting Standards, therefore, is to assure that the definitions employed are applied consistently. (*Id.*)

b) Truth In Negotiations Act

15. The Truth In Negotiations Act ("TINA") requires a contractor in certain prescribed circumstances to submit to

the government contracting officer "cost or pricing data" prior to the award of a negotiated contract or the pricing of a contract change or modification which exceeds a certain dollar threshold. 10 U.S.C. 2306(f)(1) (West's 1983). The statute also requires a contractor to certify that the data submitted is, to the best of its knowledge and belief, current, accurate and complete. "Cost or pricing data" is data which supports the costs which may or will make up part of the total cost of the contract and which, therefore, should be divulged in negotiating the contract. *See* FAR 15.801; *Cutler-Hammer, Inc. v. United States*, 416 F.2d 1306 (Ct. Cl. 1969).

16. TINA is a disclosure statute that requires a contractor to provide to the government such current, accurate and complete cost or pricing data that the contractor has in its possession. *M.R.S. Mfg. Co. v. United States*, 492 F.2d 835 (Ct. Ct. 1974); *Sylvania Elec. Products, Inc. v. United States*, 479 F.2d 1342 (Ct. Cl. 1973).

17. Thus, only if Hughes failed to disclose its cost data, or if the cost data that was disclosed was inaccurate, incomplete or noncurrent could it have violated TINA. The government bears the burden of proving nondisclosure or use of inaccurate data by a contractor in negotiating a contract. *Sylvania Elec. Products*, 479 F.2d 1342.

18. Throughout the time period identified in the Complaint, Hughes was required to disclose to the government, and did in fact disclose to the government, the cost accounting practices that it would use in estimating and reporting the costs associated with its performance of government contracts.

19. These disclosures, which were approved by the cognizant Administrative Contracting Officer, informed the government that Hughes would charge the labor hours of managerial employees and their secretaries, such as those in the SEL, whose work benefited a discreet group of contracts, to a direct allocation pool, and would allocate the hours accumulated in such pool across the base of contracts benefited by these employees' labor.

20. The cost accounting practices disclosed to the government that are at issue in this action are consistent with

the Cost Accounting Standards and were found to be so by the government.

21. Moreover, even if the accounting practice of Hughes/EDSG had been inconsistent with the CAS or the FAR, (which they were not), the principle of equitable estoppel and the long-recognized rule of prohibiting retroactive cost disallowances would apply where there is such abundant, recurring evidence of the Government's knowledge, express approval by the contracting officer, acquiescence and the contractor's consequent reasonable reliance on the practice. Board of Contract Appeals and Court decisions consistently have held that the Government cannot retroactively disapprove an accounting practice where the Government previously approved or acquiesced in the practice and the contractor reasonably relied to its detriment on the Government's past conduct, even when the practice was improper, as was the case in *Litton Systems, Inc. v. U.S.*, 449 F.2d 392 (Ct. Cl 1971); *Falcon Research & Development Co.*, ASBCA 19784, 77-1 BCA 12312, *aff'd on reconsid.*, 77-2 BCA 12795; *Data Design Laboratories*, ASBCA 21029, 81-2 BCA 15190, *aff'd on reconsid.*, 82-2 BCA 15932; and *Colorado Dental Service*, ASBCA 24666, 82-2 BCA 15836.

22. Therefore, Hughes cost accounting practices cannot be the basis for a False Claims Act violation unless the manner in which Hughes accounted for its costs was inconsistent with its disclosure to the government set forth in its CAS Disclosure Statement.

23. Because the manner in which the SEL employees named in relator's Complaint accounted for their labor time is precisely consistent with this disclosure to the government, Hughes did not violate its "promise to the government" as alleged in relator's Complaint.

24. Because the manner in which the SEL employees named in relator's Complaint accounted for their labor time is precisely consistent with this disclosure to the government and because Hughes disclosed fully these practices to the government, Hughes has not violated either the False Claims Act or the Truth In Negotiations Act.

25. Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

26. When the party moving for summary judgment demonstrates that there is no genuine issue of material fact for trial, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)(*quoting First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569 (1968)). This standard requires that the non-movant not merely rest upon the allegations of its pleading; rather it must be able to point to specific facts establishing all essential elements of its claim. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510 (*citing First National Bank*, 391 U.S. at 290, 88 S. Ct. at 1593); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (1988).

27. The test for determining whether a genuine issue of material fact exists is whether the evidence is sufficient to sustain a verdict for the non-moving party. *Anderson*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202. If the non-movant is unable to produce evidence that could lead a reasonable jury to conclude that it has satisfied its burden of proof, entry of summary judgment is appropriate. *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288-89 (9th Cir. 1987).

28. A motion for summary judgment cannot be defeated by mere conclusory allegations of wrongdoing, but must be supported by factual data sufficient to allow a reasonable jury to return a verdict for the non-moving party. *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981); *Klopfenstein v. Pargeter*, 597 F.2d 150, 151-152 (9th Cir. 1979).

29. Hughes is entitled to judgment against relator with respect to relator's claims for violations under the False

Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because the relator has no facts to support his allegations or to controvert Hughes' evidence of no wrongdoing.

30. Hughes is entitled to judgment against relator on his claims for violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because Hughes did not, knowingly or otherwise, present or cause to be presented to an officer of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

31. Hughes is entitled to judgment against relator on his claims for violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because Hughes did not, knowingly or otherwise, make, use or cause to be made or used, a false record of statement to get a false or fraudulent claim paid or approved by the government.

32. Hughes is entitled to judgment against relator on his claims for violations of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the Truth In Negotiations Act, 10 U.S.C. 2306(f), because Hughes has not committed any violation of either the False Claims Act or the Truth In Negotiations Act.

33. Hughes is therefore entitled to summary judgment each and every count of relator's Complaint.

34. (KN)~~Hughes is entitled to an award of sanctions against relator pursuant to Fed. R. Civ. P. 11 and 31 U.S.C. §§ 3730(d) for his filing of this legally and factually frivolous action.~~

Therefore, IT IS ORDERED, that summary judgment in Hughes' favor is GRANTED.

Dated: March 4, 1994 /s/ DAVID V. KENYON
Honorable David V. Kenyon
United States District Judge

Presented by:

McKENNA & CUNEO

By: /s/ SUSAN B. MYERS/for
Fred D. Heather